SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 649.

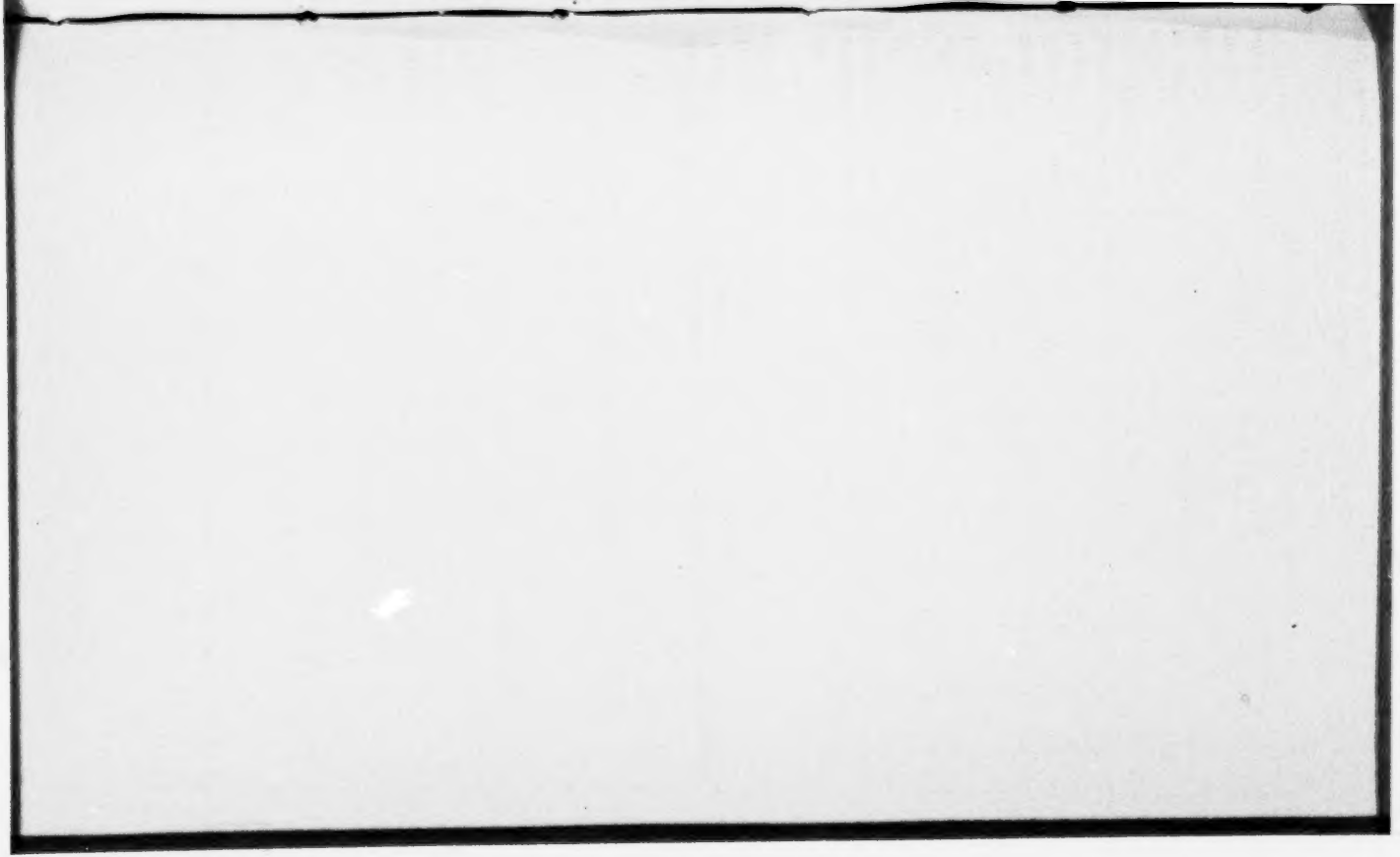
THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

SOLOMON KENOFSKEY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

INDEX.



a United States of America, District Court of the United States, Fifth Circuit and Eastern District of Louisiana, New Orleans Division.

THE UNITED STATES OF AMERICA, PLAINTIFFS IN ERROR,
versus
SOLOMON KENOFSKEY, DEFENDANT IN ERROR.

Joseph W. Montgomery, Esquire, assistant United States attorney for the United States, plaintiff in error; Henriques & Otero and H. N. Gautier, Esquires, for Solomon Kenofskey, defendant in error.

Writ of error from the Supreme Court of the United States to the District Court of the United States for the Fifth Circuit and Eastern District of Louisiana, New Orleans Division, returnable within thirty (30) days from the 15th day of August, A. D. 1911, at the city of Washington, District of Columbia.

1 *Indictment, filed January 30th, 1915.*

UNITED STATES OF AMERICA,
New Orleans Division, Eastern District of Louisiana:

At the November term of the District Court of the United States, within and for the New Orleans Division of the Eastern District of Louisiana, in the year of our Lord one thousand nine hundred and fourteen, begun and held at New Orleans, in said division and district, on the thirteenth day of January, in the year of our Lord one thousand nine hundred and fifteen.

The grand jurors of the United States of America, within and for the said New Orleans Division of the Eastern District of Louisiana, good and lawful men, duly and legally selected, chosen, drawn, and summoned from the body of the New Orleans Division of the Eastern District of Louisiana, and duly and legally empaneled, examined, sworn, and charged to inquire of and concerning crimes and offenses in the New Orleans Division of the Eastern District of Louisiana, on their oaths present:

That Solomon Kenofskey, late of New Orleans, Parish of Orleans, State of Louisiana, and the New Orleans Division of the Eastern District of Louisiana, before and at the several times of the committing of the several offenses mentioned in this indictment, was an agent and assistant superintendent at New Orleans of the Life Insurance Company of Virginia, a corporation with home offices at Richmond, Virginia, transacting a general life insurance business; that as agent and assistant superintendent aforesaid it became and was the duty of the said Solomon Kenofskey, by virtue of his said employment to receive and obtain the applications for payment of the amounts of insurance provided in the life insurance policies of said company; also to receive and obtain the required certificates
2 and proof of death, setting forth the facts entitling the applicant to payment under the terms of the policies of insurance of said company; and as such agent and assistant superintendent it

became the further duty of the said Kenofskey to view the remains of deceased policy holders and have such remains identified as those of the person insured and to make certificates showing that he, the said Solomon Kenofskey, had done so and deliver said certificates and proof of death to the superintendent in the local office of said company at New Orleans, to be forwarded in the usual course of business through the United States mails to the home office of said company at Richmond, Virginia, and when said claims had been approved and directed to be paid under and by virtue of the terms of said life insurance policies moneys and checks were delivered by the said life insurance company to the said Kenofskey for the purpose of making payment thereof, and it thereupon became the duty of him, the said Kenofskey, to deliver such moneys and checks to the claimants and obtain receipts therefor.

That on the 15th day of April, in the year of our Lord one thousand nine hundred and thirteen, at the city, parish, State, division, and district aforesaid, and within the jurisdiction of this court, the said Solomon Kenofskey, being then and there such agent and assistant superintendent of said Life Insurance Company, theretofore unlawfully, wilfully, knowingly, and feloniously devised and intended to devise a scheme and artifice to defraud the Life Insurance Company of Virginia and divers other persons, to your grand jurors unknown, by means of false and fraudulent artifices and devices and false and fraudulent representations and pretenses, and which said scheme and artifice is in substance as follows:

The said Solomon Kenofskey, as a part of said scheme and artifice, was to falsely represent to said Life Insurance Company of Virginia, and said divers other persons, to your grand jurors
3 unkown, that he had received and obtained a valid and genuine claim, proof of death, and certificates duly executed, signed, and presented by one Sarah Thompson for the payment of the amount of insurance due and payable at the death of the insured, provided in life insurance policy No. 1357704, which the said life insurance company theretofore wrote, executed, and delivered upon the life of one Frederick Wicker, wherein the said Sarah Thompson was designated as beneficiary, and representing that the said Frederick Wicker was dead; that he, the said Kenofskey, would further falsely represent to said life insurance company, as a part of said scheme and artifice to defraud, that he had received and required certificates and proof of death setting forth and declaring that the said Frederick Wicker had died, together with other facts entitling the said Sarah Thompson to full payment under the aforesaid policy; and the said Kenofskey would further represent as a part of said scheme and artifice to defraud that he had personally viewed the remains of the said Frederick Wicker, and had identified such remains as those of the body of the person insured under the aforesaid policy; and the said Kenofskey, as a part of said scheme and artifice, was further to pretend and represent that after the said insurance company had delivered to him the funds to pay

the said Sarah Thompson—to wit, the sum of $139.90—that he in fact delivered and paid over all of said moneys and checks to the said Sarah Thompson and obtained a receipt therefore from her, the said Sarah Thompson.

And each of the aforesaid representations and pretenses were at all times mentioned herein false and untrue, and the said Kenofskey intended thereby to deceive said insurance company and said divers other persons to the grand jurors unknown, so intended to be defrauded, and to induce said insurance company to part with its said money and property in the payment of said false and pretended claim, with the intent and for the purpose of converting said money to his own use and gain; whereas in truth and in fact said scheme and artifice was false and fraudulent in this, that the said Kenofskey had not received a valid and genuine claim and application from the said Sarah Thompson for the payment of said life insurance; that the said Frederick Wicker would be still living; that the said Kenofskey would not have bona fide and actual certificates and proof of death setting forth and declaring that the said Frederick Wicker had died and other facts entitling the said Sarah Thompson to full payment on the aforesaid policy, but that said claim, certificates, and proof of death would be false, fictitious, and fraudulent, and the said Sarah Thompson not entitled as beneficiary to any payment whatever on said policy; that the said Kenofskey would not view the remains of the said Frederick Wicker or identify the remains of anyone as his, as the said Wicker would be then alive; that the said Kenofskey, upon the receipt of said money from the life insurance company on said false, fictitious, and fraudulent claim, would not pay over said money to the said Sarah Thompson and would not take any valid receipt therefrom, but in fact would convert said money to his own use, all of which the said Kenofskey then and there well knew.

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And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said Solomon Kenofskey, so having devised and intended to devise the aforesaid scheme and artifice to defraud, as aforesaid, in and for executing the same and attempting so to do, did unlawfully, wilfully, knowingly, and feloniously, on the 15th day of April, 1913, at New Orleans, parish of Orleans, State of Louisiana, and within the New Orleans division of the Eastern District of Louisiana, and within the jurisdiction of this court, prepare and obtain a certain physician's certificate in substance as follows, to wit:

5

"The Life Insurance Company of Virginia, industrial department. Home office, Richmond, Va. New Orleans, No. 3-405.

"Attending physician's certificate.

"(To be filled out in ink in physician's own handwriting.)

"It is of the utmost importance, not only in the interest of the statistician, but of the medical faculty itself, that the greatest care

should be exercised in returning the true cause of death. Avoid all indefinite terms, such as 'general debility,' 'heart failure,' 'natural decline,' 'fever,' etc.

"1. Name of deceased. Frederick Wicker.

"2. Place of death. 726 Eight St.

"3. Date of death. April 14th, 1913.

"4. Correct age and from whom obtainable. 29. Apparent age. 29.

"5. Occupation, race, married or single. Driver, colored, single.

"6. How long have you been medical adviser of deceased? About 5 months.

"7. State nature of diseases and dates for which you attended deceased PRIOR TO LAST ILLNESS. None.

"Dated at New Orleans, La. April 15th, 1913.

"8. Was deceased afflicted with any CHRONIC disease or with any physical or mental defect, infirmity, or deformity? If so, of what nature and for how long? No.

"9. Date of your first visit or prescription in last illness. Nov. 12th, 1912.

"10. Date of your last visit. April 9th, 1913.

"11. State duration of last illness. Don't know.

"12. State the remote cause of death and its duration.

"13. State immediate cause of death. Pul. tuberculosis.

"14. Was there any special causes, direct or indirect, for the death, in the habits, occupation, or residence of the deceased? No.

"Signature: GEO. G. FREDERICKS.

"Professional title: M. D.

"Address: 4395 S. Claiborne.

"Note.—Claimants are bound to produce, at their own expense, such medical testimony as to cause of death, duration of disease, etc., as may be required by the company. If an INQUEST be held, the coroner's certificate and a copy of the evidence must be produced."

6 And a certain proof of death and claimant's certificate, agent's certificate, certificate of identity, and certificate of the superintendent or assistant superintendent in substance as follows, to wit:

"Proof of death. Claimant's certificate. The Life Insurance Company of Virginia, industrial department, home office, Richmond, Va.

"Every question must be fully answered, otherwise the proofs will be returned for completion.

"1. State the No. of policy and amount of benefit claimed. Policy No. 1357704. Benefit, $90.00

"2. What is your name? Sarah Thompson.

"3. In what capacity or by what right do you claim? As *gau*'dian and party as paying expenses.

"4. State your residence? No. 726; Street, 8th; Town, N. O.

"5. State your age. 47 years.

"6. State the full name of deceased? Frederick Wicker.

"7. How long have you known deceased? All his life.

"8. What was the occupation of deceased? Driver.

"16. What sickness previous to last one did deceased ever have, and when? None seriously.

"17. When was the health of deceased first affected? About 5 months ago.

"18. How long prior to death was deceased confined to the house? About 10 days.

"19. State the name and residence of every physician who has attended deceased during the past year. Dr. Fredericks, Claiborne St.

"20. A. Was deceased married? No. B. If married, is wife or husband alive? ——— C. Was deceased living with husband or wife at time of death? ———.

"9. Place of birth of deceased? N. O., La. Date of birth of deceased? Year, DK. Month, DK. Day, DK.

"10. Place of death of deceased? 726 8th. Date of death of deceased? Year, 1913; month, Apl.; day, 14th.

"11. What do you state was the cause of death? Consumption.

"12. A. Name and address of deceased's last employer? J. Garcono, Liberty & 7th.

7 "12. B. Business of employer? Grocer.

"13. On what date did deceased quit work? About 4 months ago.

"14. When did deceased first consult a physician? About 5 months ago.

"15. Had deceased at any time been an inmate or under treatment in any hospital, asylum, or other institution? If so, when, where, and for what ailment? No.

"21. Are deceased's father and mother living or dead? If living: Father, mother. Age. Condition of health. If dead: Father, age DK. Cause of death? DK. Mother, 36; childbirth.

"22. How many deceased's brothers or sisters are living? Give names and age. Brothers, none; sisters, none.

"23. How many of deceased's brothers or sisters are dead? State ages at death and cause of death. Infant.

"24. Give name and ages of deceased's children who are living? None.

"25. If any of deceased's children are dead, state age at death, and date of death. None.

"26. If parents, brothers, and sisters of deceased are dead, who is the next of kin living? The claimant.

"27. What other insurance did deceased have? State companies and amounts. None.

"28. Are any other members of deceased's family now insured in this company? If so, give numbers of policies. Yes. 1355260–1466810.

"29. Has this company ever paid a claim on the life of any member of deceased's family? If so, give number of policy and date when paid. No.

"I hereby declare that I am the holder of the policy above specified and of the premium receipt book belonging with said policy, and that all premiums due on said policy were paid prior to death of the insured. I declare that the foregoing answers and statements are true and full; that I am legally entitled to the amount of said policy, and if the company desires supplemental proofs I will furnish such as they prescribe, and no claim shall be held to exist until such proofs are furnished.

"Signature of claimant:

"SARAH (her mark) THOMPSON.

"Witness: ANNIE HAWKINS.

"Date: 15 day of Apl., 1913.

"In addition to agent's signature as witness some respectable person must also sign below as witness.

"(Fill out in second witness' own handwriting.)

"Second witness: S. KENOFSKEY. Occupation. Asst. Full address: 2316 Palmyra.

"Note.—Claimants are required to produce their own expense, such medical testimony as to cause of death, duration of disease, etc., as shall be satisfactory to the company. If an inquest be held the coroner's certificate and a copy of the evidence must be produced. These proofs must be accompanied by the medical certificate, the policy, and the last premium receipt book. Where a claim is made under two or more policies by the same claimant but one of these forms is necessary. A person under twenty-one years of age, being

an infant in the eye of the law, cannot be recognized as a claimant; in such a case claim must be made by an adult relative of deceased or a guardian for the child or an administrator or executor
8 of the deceased's estate, after due appointment of such guardian, executor, or administrator by the probate judge or proper court."

"To be filled up and signed by the agent: No. of policy, 1357704; amt. prem. to be returned, $49.90; amount claimed on policy, $90.00.

"Date of policy, 21 day of Sept., 1903. Premium, 10 cents. Entered in my life register between totals $139.67 and $140.82, page 177.

"I hereby declare that I have personally investigated the particulars of the following claim, which appear to me to be correct, and that the person who signed the claimant's certificate is the guardian of the deceased, and I believe said person to be rightfully entitled to the sum insured under the policy.

"State the race of deceased: Col. Male or female: Male. When was deceased born? DK day of DK, 1DK. How did you ascertain birth of deceased? from claimant. Full address of deceased: Frederick Wicker, 726 8th.

H. E. WEISS, *Agent.*

S. KENOFSKEY, *Ass't Sup't.*

"Certificate of identity.

"I (not being a relative of deceased) do hereby certify that Frederick Wicker, whose life, I am informed, was insured in the Life Insurance Company of Virginia, resided at 726 8th and followed the occupation of driver, and that he died on the 14 day of Apl., 1913, and that he had resided at the above-stated residence during the last 3 years. I also certify that I saw deceased on or about the 11 day of Apl., 1913, at which time he appeared to be 29 years of age.

"Signature: DAVID WELLER.
"Address in full: 804 9th.
"Occupation: Plasterer.

"Witness: LOUISE MASON.
"Date: 15 day of April, 1913.
"Second witness: KENOFSKEY.
"Full address: 2316 Palmyra.
"Two witnesses must sign the above certificate.

"Certificate of the superintendent or assistant superintendent.

"After all other forms relative to this claim are completed, the superintendent or assistant superintendent must then begin his investigation, view the remains, and satisfy himself about the particulars of this claim. The following questions must be answered only upon personal examination into the facts:

"1. Name of deceased? Frederick Wicker.
"2. Residence: No. 726 8th Street, town of N. O., State of La.

"5. What evidence have you that deceased was the same person insured under policy mentioned on the other side of this form? From neighbors.

"6. Have you had an interview with the attending physician about his or her death? If not, why not? Yes.

9 "3. Date of birth of deceased. DK day of DK 1 DK. State authority for answer to this question. The claimant.

"4. A. Have you personally viewed the remains of the deceased? (Yes or no.) Yes. B. State when and where. April 15; above residence. C. Did deceased appear older or younger than age stated on policy? As stated.

"7. Did you learn from the attending physician anything about deceased of which the company ought to be informed, not brought out in the other certificate? No.

"8. Out of whose funds were the premiums paid? The claimant.

"9. Do you think the claim a just one, and at what age when insured do you recommend its payment? As stated on policy.

"Dated at N. O. La., this 15 day of April, 1913.

"S. KENOFSKEY, *Asst. Superintendent.*

"Approved.

"R. SHERWOOD, Jr., *Superintendent.*"

And each of the said documents so then and there prepared and obtained was then and there in furtherance of the said scheme and artifice to defraud, and then and there falsely represented that the said Frederick Wicker, insured in the said Life Insurance Company of Virginia, died on the 14th day of April, 1913, of consumption, and that the amount due the said Sarah Thompson, beneficiary, was $139.90, and said documents set forth other facts which, if true, would have entitled said Sarah Thompson to full payment under the aforesaid policy, whereas said documents and proof of death were false and fictitious in that the said Frederick Wicker is still living and in that there was nothing due the said Sarah Thompson, beneficiary, under and by virtue of the said life insurance policy, all of which he, the said Solomon Kenofskey, then and there knew.

And the said Solomon Kenofskey, so having prepared and obtained the aforesaid false, fictitious, and fraudulent documents which constituted a proof of death and claim as aforesaid, and the said Kenofskey, on the 15th day of April, 1913, well knowing that all such claims required approval by the home office of the said insurance company, at Richmond, Virginia, before any payment
10 would be made to the beneficiary or other person and that all such claims were transmitted from the local office at New Orleans to the home office at Richmond, Virginia, through the United States mails, and that if handed by him to the superintendent in the local office at New Orleans he, the said Kenofskey, could by so doing, then and there cause said claim to be forwarded by

said superintendent to the said insurance company at Richmond, Virginia, through the United States mails, did then and there deliver to the said superintendent, one R. Sherwood, the aforesaid documents, then and there intending the said documents to be placed in the United States mails to be sent and delivered by the postoffice establishment of the United States to the said insurance company at Richmond, Virginia, and the said superintendent of said insurance company, to wit, R. Sherwood, did then and there examine said documents without knowledge of the fraudulent character thereof and affixed his signature thereto after the printed word "Approval" and above the printed word "Superintendent," and the said documents were then and there enclosed in a certain envelope addressed and directed to the Life Insurance Company of Virginia, claim department, Richmond, Virginia, and the said documents so enclosed were on the 15th day of April, 1913, by the local office of the said insurance company in the due course of business, placed in an authorized depository for mail matter in the city of New Orleans to be sent and delivered to the said insurance company at Richmond, Virginia, by the postoffice establishment of the United States; and the said Solomon Kenofskey well knew and intended at the time said documents were turned over to the said R. Sherwood that the said local office, of which R. Sherwood was superintendent and the said defendant the assistant superintendent, would, in accordance with the uniform and established custom, place the said documents in the United States mails as aforesaid, and on which said envelope in which said documents were then and there enclosed, as aforesaid, the legal United States postage had been paid.

11 And so your grand jurors do say that the said Solomon Kenofskey having devised a scheme and artifice to defraud and for obtaining money and property from the Life Insurance Company of Virginia by means of false and fraudulent pretenses and representations, which scheme and artifice is as aforesaid for the purpose of executing same and attempting so to do, on the 15th day of April, 1913, did in the manner and form aforesaid, knowingly, wilfully, unlawfully, and feloniously cause the aforesaid documents hereinabove fully set forth and enclosed in an envelope addressed and directed to the Life Insurance Company of Virginia, at Richmond, Virginia, to be placed in an authorized depository for mail matter to be sent and delivered by the postoffice establishment of the United States to the Life Insurance Company of Virginia, at Richmond, Virginia; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

(Signed) JOSEPH W. MONTGOMERY,
Assistant United States Attorney.

12 *Demurrer, filed June 4th, 1915.*

UNITED STATES *vs.* SOLOMON KENOFSKEY. } No. 3001. United States District Court, Eastern District of Louisiana, New Orleans Division.

And now Solomon Kenofskey in his own proper person assisted by counsel cometh into court here, and having heard the indictment read, and preserving to himself the benefit of all pleas and defenses, for demurrer to the said indictment herein says:

That the said indictment and the matters and things therein contained in the manner and form as therein set forth are not sufficient in law to charge an offense, and that he, the said Solomon Kenofskey, is not bound by law to answer the same, and this he is ready to verify.

Wherefore, for want of sufficient indictment in this behalf and for other numerous sufficient reasons appearing on the face of said indictment, he, the said Solomon Kenofskey, prays judgment and that he may be dismissed and discharged from the premises in said indictment.

And now the said Solomon Kenofskey for special demurrer to the said indictment says:

I.

That the said indictment purports to charge him with having violated section 215 of the Criminal Code of the United States.

II.

That the said indictment charges him with having formed a scheme and artifice to defraud and to obtain money from the Life Insurance Company of Virginia, and then purports to charge him with having caused to be placed in an authorized depository for mail matter to be sent and delivered by the post-office establishment of the United States to the Life Insurance Company of Virginia,
13 at Richmond, Virginia, the certain documents and writings in said indictment fully set forth.

III.

That the acts and things therein alleged to have been done by him for the purpose of charging him with placing the aforesaid documents and writings in an authorized depository for mail matter are not sufficient to constitute causing to be placed in an authorized depository for mail matter by him within the meaning of the terms of the said statute "cause to be placed * * * in any * * * authorized depository for mail matter" when properly construed and understood.

IV.

The said Solomon Kenofskey therefore says that the acts and things alleged in the said indictment are not sufficient to constitute a violation of section 215 of the Criminal Code of the United States properly construed and understood or of any other law of the United States.

Wherefore, for want of sufficient indictment in this behalf, he, the said Solomon Kenofskey, prays judgment that he may be dismissed from the premises in said indictment.

(Signed) HENRIQUES & OTERO,
" H. N. GAUTIER,
Attorneys of Defendant.

STATE OF LOUISIANA,
Parish of Orleans:

Solomon Kenofskey, being duly sworn, deposes and says that he is the defendant herein; that the foregoing demurrers are filed in good faith and not for the purpose of delay; and that each and all the matters therein contained are true to the best of his knowledge.

(Signed) SOLOMON KENOFSKEY.

Sworn to and subscribed before me this 2d day of June, 1915.

(Signed) H. N. GAUTIER, *N. P.*

I certify that to the best of my knowledge and belief the foregoing demurrers are well founded in law.

(Signed) H. N. GAUTIER,
Attorney of Defendant.

14 *Hearing on demurrer and submission.*

Extract from the minutes, February term, 1916.

New Orleans, Saturday, April 22nd, 1916. Court met pursuant to adjournment. Present: Hon. Rufus E. Foster, judge.

UNITED STATES
vs. } No. 3001.
SOLOMON KENOFSKEY.

This cause came on this day to be heard upon the demurrer filed by the defendant to the indictment herein. Present: A. D. Henriques, of counsel for the defendant; Solomon Kenofskey, appearing in support of said demurrer; Joseph W. Montgomery, assistant

United States attorney, appearing on behalf of the United States; and was argued by counsel for the respective parties and submitted, when the court took time to consider.

15 *Opinion of the court sustaining demurrer, filed July 24th, 1916.*

UNITED STATES
vs.
SOLOMON KENOFSKEY. } No. 3001. United States District Court, Eastern District of Louisiana.

In this case the indictment sets up a scheme to defraud by use of the mail in violation of section 215 of the Penal Code. The facts charged, upon which the overt act is predicated, are as follows:

Kenofskey was an agent and assistant superintendent of the Life Insurance Company of Virginia at New Orleans, and it was part of his duty to view and identify the remains and obtain certificates of deaths of persons insured. He devised a scheme to defraud the insurance company by presenting to it fraudulent death claims supported by false certificates. He knew all such claims required approval by the home office of the company at Richmond, Virginia, before payment, and were sent by mail from the local office to the home office. In pursuance of the scheme he handed certain false documents to the local superintendent at New Orleans, and he in turn approved them without knowledge of their fraudulent character and deposited them in the mail for transmission to the home office in Richmond.

It is alleged the defendant knew the documents would be sent by mail and intended that they should be. The depositing of the letter in the mail for the purpose of executing the scheme is the crime. The defendant did not mail the letter, and the local superintendent of the insurance company was not his agent. It is not charged it was the duty of the defendant either to prepare for mailing or to actually mail the papers. He is sought to be held on the theory that as he knew the claim would be mailed to the home office, in the usual course of the business, for approval before payment, he
16 knowingly caused it to be deposited. This theory is too far fetched to be tenable. Furthermore, in order to constitute a crime, the mailing of the letter must have been a step in the execution of the fraudulent scheme. The scheme devised by defendant was completely executed when he handed the false claim to the local agent at New Orleans.

However desirable it may be from the viewpoint of the victim to try all perpetrators of fraudulent schemes in the Federal courts, this court can not assume jurisdiction except in clear cases.

The demurrer will be sustained.

17 *Order sustaining demurrer.*

Extract from the minutes, May term, 1916.

New Orleans, Monday, July 24th, 1916. Court met pursuant to adjournment. Present: Hon. Rufus E. Foster, judge.

UNITED STATES
vs.
SOLOMON KENOFSKEY. } No. 3001.

This cause came on at a former day to be heard upon the demurrer filed by the defendant to the indictment herein, and was argued by counsel for the respective parties and submitted, when the court took time to consider.

Whereupon, and on due consideration thereof, and for the written reasons of the court on file herein—

It is ordered, adjudged, and decreed by the court that the said demurrer be, and the same is hereby, sustained; that the indictment herein be dismissed; and that the said defendant, Solomon Kenofskey, be discharged without day in the premises.

18 *Motion for writ of error, filed August 15, 1916.*

UNITED STATES
vs.
SOLOMON KENOFSKEY. } No. 3001. United States District Court, Eastern District of Louisiana, New Orleans Division.

On motion of the United States herein appearing by Joseph W. Montgomery, assistant United States attorney, and on suggesting error to the prejudice of the United States in the judgment rendered in this case on the 24th day of July, 1916, sustaining the demurrer filed in this case by the defendant, and on further suggesting the assignment of errors herein filed—

It is ordered that a writ of error be granted the United States, returnable within thirty days from this date to the Supreme Court of the United States, at Washington, D. C., and that the said writ of error act as a supersedeas, and the United States be dispensed from giving bond on said writ of error.

(Signed.) RUFUS E. FOSTER, *Judge.*

AUGUST 15th, 1916.

19 *Assignment of errors, filed August 15th, 1916.*

UNITED STATES *vs.* SOLOMON KENOFSKEY.	No. 3001. United States District Court, Eastern District of Louisiana, New Orleans Division.

Assignment of errors.

Now comes the United States in this case praying for a writ of error and assigns the following errors in the proceedings, judgment, and decree of the trial court in this case, sustaining the demurrer of the defendant:

I.

The trial court erred in sustaining the demurrer to the indictment filed by the defendant.

II.

The trial court erred in not overruling and setting aside the demurrer filed by the defendant.

III.

The trial court erred in its construction of the statute upon which the indictment in this case is founded, and particularly in its construction of the words "shall, for the purpose of executing such scheme or artifice, or attempting so to do, place or cause to be placed, any letter * * * in any * * * authorized depository for mail matter," used in such statute, and in holding under its erroneous construction of those words that the indictment on its face does not show that the defendant, for the purpose of executing the scheme and artifice set out in the indictment caused to be placed in an authorized depository for mail matter the document set forth in the indictment.

IV.

20 The court erred in its construction of the statute upon which this indictment is founded, and particularly in its construction of the words "shall, for the purpose of executing such scheme or artifice, or attempting so to do, place or cause to be placed any letter * * * in any * * * authorized depository for mail matter," as used in said statute, and in not holding that the facts set forth in the indictment in this case showed, under a proper construction of the statute and the words "shall, for the purpose of executing such scheme or artifice, or attempting so to do, place or cause to be placed any letter * * * in any * * * authorized depository for mail matter," as used therein, the commission of a criminal violation of the said statute by the defendant.

And for these errors and others apparent on the face of the record the United States of America prays that the said judgment of July 24th, 1916, be reversed and the cause remanded for such other proceedings as may be proper, and that such other and further orders may be rendered as may be just.

(Signed) JOSEPH W. MONTGOMERY,
Assistant United States Attorney.

21 *Præcipe for transcript, filed August 24th, 1916.*

UNITED STATES *vs.* SOLOMON KENOFSKEY. } No. 3001. United States District Court, Eastern district of Louisiana, New Orleans Division.

Stipulation.

It is hereby stipulated and agreed by and between the plaintiff and defendant in error, through their attorneys, that the clerk shall include in the transcript of the record for the hearing of the writ of error herein sued out the following:

I. The indictment.
II. The demurrer.
III. The minute entry of the hearing and submission.
IV. The opinion of the court.
V. The judgment sustaining the demurrer.
VI. The appeal papers.

(Signed) JOSEPH W. MONTGOMERY,
Assistant U. S. Attorney, for Plaintiff in Error.

(Signed) H. N. GAUTIER & A. D. HENRIQUES,
Attorneys for Defendant in Error.

22 United States of America, District Court of the United States, Fifth Circuit and Eastern District of Louisiana, New Orleans Division.

CLERK'S OFFICE.

I, Henry J. Carter, clerk of the District Court of the United States for the Eastern District of Louisiana, do hereby certify that the foregoing 21 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had and assignment of errors in the case of The United States of America versus Solomon Kenofskey, No. 3001 of the criminal docket of the District Court of the United States, Fifth Circuit and Eastern District of Louisiana, New Orleans Division, said transcript being made up in accordance with the præcipe copied herein.

Witness my hand and the seal of said court, at the city of New Orleans, Louisiana, on this 24th day of August, A. D. 1916.

[SEAL.] H. J. CARTER, *Clerk.*

23 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the District Court of the United States for the Eastern District of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between United States, plaintiff, and Solomon Kenofskey, defendant, No. 3001 of the docket of the United States District Court for the Eastern District of Louisiana, a manifest error hath happened, to the great damage of the said United States, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all the things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., within 30 days from the date hereof, in the said Supreme Court of the United States, to be then and there held; that the record and proceedings aforesaid being inspected the said Supreme Court of the United States may cause further to be done therein to correct that error, what, of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court of the United States, this 15th day of August, in the year of our Lord one thousand nine hundred and sixteen.

H. J. CARTER,
Clerk of the United States District Court
for the Eastern District of Louisiana.

Allowed:
RUFUS E. FOSTER, *Judge.*

24 (Indorsed:) United States District Court, No. 3001. United States versus Solomon Kenofskey. Writ of error. No. ——, U. S. District Court, Eastern District of Louisiana, New Orleans Division. Filed Aug. 15, 1916. Hy. J. Loisel, dep. clerk.

25 The United States of America, District Court of the United States, Eastern District of Louisiana.

The President of the United States to Solomon Kenofskey, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington, D. C., within 30 days from date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United

States for the Eastern District of Louisiana, wherein the United States is plaintiff in error and Solomon Kenofskey is defendant in error in the cause entitled United States vs. Solomon Kenofskey, No. 3001 of the docket of the United States for the Eastern District of Louisiana, to show cause, if any there be, why the judgment rendered against the said the United States as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Rufus E. Foster, judge of the United States District Court, at New Orleans, La., this 15th day of August, in the year of our Lord one thousand nine hundred and sixteen.

[SEAL.] (Signed.) RUFUS E. FOSTER, *Judge.*

Clerk's office: A true copy of the original. New Orleans, La., August 15th, 1916.

H. J. CARTER, *Clerk.*

26 Received by U. S. marshal, New Orleans, La., August 15th, 1916, and on August 17th, 1916, I served the original of which this is a certified copy on Solomon Kenofskey by handing same to him in person in the city of New Orleans, La. Car fare 20 c.

FRANK M. MILLER,
U. S. Marshal,
By EDW. J. FLEMING,
Deputy.

(Endorsed:) Return. United States District Court, Eastern District of Louisiana. No. 3001. United States vs. Solomon Kenofskey. Citation of appeal. Marshal's return. U. S. District Court, Eastern District of Louisiana, New Orleans Division. Filed, Aug. 24, 1916. W. B. Donovan, Dep. clerk. Office of the clerk, Supreme Court, U. S., received Sep. 2, 1916.

(Indorsement on back:) File No. 25,479, E. Louisiana, D. C. U. S. Term No. 649. The United States, plaintiff in error, vs. Solomon Kenofskey. Filed September 2d, 1916. File No. 25,479.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
SOLOMON KENOFSKEY.
No. 649.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and in accordance with the provisions of the Criminal Appeals Act, 34 Stat. 1246, moves the court to advance the above-entitled cause for hearing on a day convenient to the court.

Defendant was indicted in the District Court of the United States for the Eastern District of Louisiana for using the mails to execute a scheme to defraud, which he had theretofore devised, in violation of section 215 of the Penal Code.

A demurrer to the indictment was sustained, the District Court holding that knowledge that the writings constituting a part of the scheme to de-

fraud would in due course of business be ultimately deposited in the mails (said writings not having been placed in the mails by defendant personally) does not constitute causing the placing of said writings in the United States mails within the meaning of section 215 of the Penal Code.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

NOVEMBER, 1916.

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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
SOLOMON KENOFSKEY.
No. 649.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

STATEMENT OF THE CASE.

This is a writ of error to the District Court of the United States for the Eastern District of Louisiana brought under the "Criminal appeals act" of March 2, 1907 (34 Stat. 1246), to review a decision sustaining a demurrer to an indictment charging the defendant with fraudulently and knowingly placing and *causing* a false claim for the payment of a life-insurance premium to be placed in the United States mails for transmission to the home office of the company in violation of the provisions of section 215 of the Criminal Code.

The indictment charges specifically that the defendant in error, Solomon Kenofskey, was the agent and assistant superintendent at New Orleans, La., of

the Life Insurance Co. of Virginia; that it was a part of his duty to obtain certificates and proofs of death of persons insured in the company entitling the beneficiaries named in its policies to the premiums thereof; that it was his further duty to view the remains of deceased policy-holders, have them identified and deliver the certificates and proof of death to the superintendent of the local office at New Orleans (Rec. 2) "*to be forwarded in the usual course of business through the United States mails to the home office of said company at Richmond, Virginia.*" [italics ours]; that in pursuance of a fraudulent scheme Kenofskey falsely represented to said life insurance company that he had received and obtained a valid and genuine claim, proof of death and certificates duly executed, signed and presented by Sarah Thompson, the beneficiary in a policy which had been issued upon the life of one Frederick Wicker. The false certificates are set out in full, Kenofskey signing the certificate of identity and death of the assured as assistant superintendent. That as a matter of fact Frederick Wicker is still living and that the defendant in error prepared and obtained the false and fraudulent certificates and other documents which constituted a proof of death in the claim (Rec. 7, 8) "*well knowing that all such claims required approval by the home office of the said insurance company at Richmond, Virginia, before any payment would be made to the beneficiary or other person and that all such claims were transmitted from the local office at New Orleans to the home office at Richmond, Virginia, through the United States mails, and that if*

handed by him to the superintendent of the local office at New Orleans, he, the said Kenofskey, could by so doing, then and there cause said claim to be forwarded by said superintendent to the said insurance company at Richmond, Virginia, through the United States mails" [italics ours]; and that said fraudulent certificates and claim were forwarded by the local superintendent through the mails with intent on the part of Kenofskey to defraud the life insurance company of the amount of the premium named in the policy (Rec. 1–8).

The applicable portions of the court's opinion are (Rec. 11):

> Kenofskey was an agent and assistant superintendent of the Life Insurance Company of Virginia at New Orleans, and it was part of his duty to view and identify the remains and obtain certificates of deaths of persons insured. He devised a scheme to defraud the insurance company by presenting to it fraudulent death claims supported by false certificates. He knew all such claims required approval by the home office of the company at Richmond, Virginia, before payment, *and were sent by mail* from the local office to the home office. In pursuance of the scheme he handed certain false documents to the local superintendent at New Orleans, and he in turn approved them without knowledge of their fraudulent character and *deposited them in the mail* for transmission to the home office in Richmond.
>
> It is alleged the defendant knew the documents would be sent by mail and intended

that they should be. The depositing of the letter in the mail for the purpose of executing the scheme is the crime. The defendant did not mail the letter, and the local superintendent of the insurance company was not his agent. It is not charged it was the duty of the defendant either to prepare for mailing or to actually mail the papers. He is sought to be held on the theory that as he knew the claim would be mailed to the home office, in the usual course of the business, for approval before payment, he knowingly caused it to be deposited. This theory is too far fetched to be tenable. Furthermore, in order to constitute a crime, the mailing of the letter must have been a step in the execution of the fraudulent scheme. The scheme devised by the defendant was completely executed when he handed the false claim to the local agent at New Orleans.

THE STATUTE.

Section 215 of the Criminal Code is an enlargement of the act of March 2, 1889 (25 Stat., 873—which in turn is taken from Rev. Stat., sec. 5480), and the portion thereof applicable to this case reads:

> Whoever, having devised * * * any scheme or artifice to defraud, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, *or cause to be placed*, any letter * * * package * * * writing * * * in any post office, * * * *to be sent or delivered by the post office establishment of the United States*, * * * etc.,

shall be punished, etc. The prior statute (sec. 5480, Rev. Stat.) provided as follows:

> If any person having devised * * * any scheme or artifice to defraud, * * * shall, in and for executing such scheme or artifice, or attempting so to do, place any letter * * * etc.

Revised Statutes, section 5480, punished a person who *placed* any letter or package in any post office of the United States in carrying out a scheme to defraud.

Section 215 (upon which this indictment is based) provides not only for the punishment of the *placing* of any letter or package in a United States post office in furtherance of such scheme, but also for the punishment of any person who shall *cause to be placed* any such letter or package in the mails for the same purpose.

SPECIFICATIONS OF ERROR.

I.

The court erred in deciding (Rec., 11) that the offense charged in the indictment did not fall within the terms of section 215 of the Criminal Code.

II.

The court erred in holding that because the local superintendent of the company was not the agent of the local agent against whom the indictment is brought and the latter did not himself deposit the letter containing the false and fraudulent claim and certificates in the mail, no offense was committed under section 215.

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III.

The court erred in holding that the scheme devised by the defendant was completely executed when the false claim and certificates were handed to the local superintendent at New Orleans.

ARGUMENT.

I.

This Court has jurisdiction.

In the opinion of the court sustaining the demurrer (Rec., 11), the court in effect held that the acts of the defendant charged in the indictment did not come within the terms of section 215 of the Criminal Code.

In *United States* v. *Patten* (1913), 226 U. S., 525, 535, this court said:

> It is a solecism to say that the decision that the acts charged are not within the statute is not based upon a construction of it.

See also *United States* v. *Nixon* (1914), 235 U. S., 231; *United States* v. *New South Farm, etc. Co.*, (1916) 241 U. S., 64, 71.

II.

Any person who intends that the mails shall be used, and who has knowledge that in the ordinary and natural course of affairs the mails will be used, to carry out a fraudulent scheme devised by him is guilty, under the statute, if the mails are actually so used in accordance with his intention and knowledge.

If the mailing of the letter was the natural and probable and intended effect of the defendant's scheme, he has caused the letter to be mailed within the purview of the statute.

It is not necessary to the commission of an offense of this character that the prime mover therein shall in person deposit the letter constituting a part of the scheme to defraud in the United States post office.

The indictment is sufficiently supported by the allegations that the defendant in error when he handed the false claim and proofs of death to the local superintendent knew that in the due course of business they would be transmitted through the United States mails to the company which he was attempting to defraud, and intended that they should be so transmitted.

(1) *It is immaterial how complex the scheme may be or how far removed the actual mailing from the causing, if the one was the natural, probable, and intended result of the other.*

If the defendant conceived a fraudulent scheme, an intended and natural and probable part of which included the mailing of a letter by another person, and such intended mailing took place as planned by him, the defendant must be deemed to have "caused to be placed" the letter in the mails.

The only province of the lower court in this case was to decide whether the facts alleged in the indictment could, as a matter of law, constitute a "cause" of the letter being placed in the mails, within the meaning and intent of the statute.

The indictment set out the following facts:

(a) The fraudulent scheme to defraud the insurance company;

(b) The preparation of a false claim of loss;

(c) The knowledge that "all such claims were transmitted by the local office * * * to the home office," and "that if handed by him to the local office at New Orleans, he, the said Kenofskey, could by so doing then and there cause to be forwarded by said superintendent to the said insurance com-

pany at Richmond, Va., through the United States mails";

(d) The delivery to the superintendent with intent to have the claim mailed by the superintendent;

(e) The actual mailing by the superintendent;

(f) That Kenofskey thereby caused the claim to be mailed.

The only question for the court to decide was: If all these facts are true, can the defendant be found to have caused the mailing, within the purview of the statute?

It was not incumbent on the court to decide whether the actions of the defendant did, in fact, constitute the "cause." That was the province of the jury.

The Government submits that the lower court fell into the error of substituting its decision for that of the jury on a question of fact.

To reach the conclusion which it actually reached, the court must have found that the actual "uniform and established custom," and the "due course of business" of the company, and the defendant's knowledge of this custom and his intent with reference to it, and the actual mailing of the letter by the company's superintendent in accordance with this custom and course of business and in line with the defendant's original plan and scheme, could not, *as a matter of law*, bear the relation of cause and effect. This conclusion, the Government submits, was clearly wrong.

The defendant here expressly intended that the claim should go to the home office, and knew that it would be ordinarily transmitted by mail. It was an integral part of his scheme that it should be so mailed by the local office. Without such mailing, his fraudulent scheme would have proved of no avail. The defendant, knowing that the natural consequence of his act of delivery of the claim to the superintendent would be its deposit in the mail, would, by elementary principles, be held to have intended the mailing, even if he had no express intent. *Allen* v. *United States* (1896), 164 U. S., 492, 496; Holmes' Common Law, 53.

Granted the intent existing in fact or legal implication, responsibility for the intended result can not be denied because the chain between cause and effect has many links.

> Any intended consequence of an act is proximate. It would plainly be absurd that a person should be allowed to act with an intention to produce a certain consequence, and when that very consequence in fact follows his act, to escape liability for it on the plea that it was not proximate. 28 Harvard Law Review, 17.
>
> See also: Pollock on Torts, 8th ed., p. 331; *Quinn* v. *Leathem* (1901), App. Cas., 495, 537; Salmond, Jurisprudence, 4th ed., p. 327.

If the superintendent be regarded as the defendant's agent, the latter would have "caused the letter to be mailed," whether such agent were an innocent or guilty participant in the transaction. *Rose* v. *United*

States (C. C. A., 8th Circ., 1915), 227 Fed., 357; *Hume* v. *United States* (C. C. A., 5th Circ., 1902), 118 Fed., 689 (cert. denied 189 U. S., 510); *United States* v. *Flemming* (1884), 18 Fed., 907; *Burton* v. *United States* (C. C. A., 8th Cir., 1906), 142 Fed., 57, 62; *Shepard* v. *United States* (C. C. A., 8th Circ., 1908), 160 Fed., 584, 595; *Bates* v. *United States* (1881), 10 Fed., 92, 95.

Instead of an agent, the instrumentality of an office routine was employed by the defendant to carry out his fraudulent scheme. The administrative machinery of the office was as efficient as a mechanical appliance, or as though the defendant had with his own hand dispatched the letter.

It is as much my act when I fix a bar so that a man will run against it as when I hit a man with a bar (*Regina* v. *Martin* (1881), 8 Q. B. D., 54); when I place a spring gun for a man which he sets off himself, as when I shoot him (*Simpson* v. *State* (1877), 59 Ala., 1; *State* v. *Barr* (1895), 11 Wash., 481); when I place poison so that a man shall take it himself, or so that another will administer it, as when I personally administer poison to him (*Com.* v. *Kennedy* (1897), 170 Mass., 18; *Rex* v. *Harley* (1830), 4 Car. and P., 369; *Regina* v. *Michael* (1840), 9 Car. and P., 213); when I cause bricks to fall upon a man as when I strike him with a brick (*Regina* v. *Hughes* (1857), 7 Cox. C. C., 301); see also article in 9 Harvard Law Review, 82.

The complexity of the machinery used in immaterial. It is none the less murder or assault, if caused through cold, wild beasts, starvation, fright, or dis-

ease, or perjury. *Pallis* v. *State* (1898), 123 Ala., 12; *Regina* v. *Martin* (1868), 11 Cox. C. C., 136; 1 Hale P. C., 431; *Regina* v. *Instan* (1893), 1 Q. B., 450; *In re Heigho* (1910), 18 Ida., 566; *Regina* v. *Greenwood* (1857), 7 Cox. C. C., 404; 1 Russell on Crimes (7th Eng. Ed.), 679.

(2) *If part of the defendant's scheme included a mailing of a letter, it is immaterial that the letter was to be mailed by some person other than the defendant himself.*

It is elementary that a person who sets on foot a scheme whereby a crime is committed is guilty as a principal.

In *United States* v. *Thayer* (1908), 209 U. S., 39, the defendant was indicted for soliciting a contribution of money for political purposes from an employee of the United States in a post-office building of the United States in violation of the "civil-service act," which provided that no such solicitation should be made in any room or building occupied in the discharge of official duties by an officer or employee of the United States or on certain Government reservations. The defendant mailed letters soliciting contributions to employees in a Federal post office, but did not take them personally to the post office.

He was indicted, and demurred on the ground that his physical presence in the building was a necessary element of the offense, and as he was not so present he was not included within the terms of the statute. This court briefly disposed of the contention, Mr. Justice Holmes saying (p. 42):

> Of course it is possible to solicit by letter as well as in person. It is equally clear that the

> person who writes the letter *and intentionally puts it in the way of delivery solicits*, whether the delivery is accomplished by agents of the writer, *by agents of the person addressed, or by independent middlemen*, if it takes place in the intended way. [Italics ours.]

The expression of the court just quoted effectually disposes of the decision of the United States district court in the case at bar that the defendant in error was not included in the statute because the local superintendent of the life insurance company "was not his agent." In the Thayer case, *supra*, there was not such broad and comprehensive language as is employed in section 215, the "civil service act" simply penalizing the solicitation of political contributions under the circumstances set out and remaining entirely silent upon the causing of such solicitation. Yet the court held that the party who solicited by letter was guilty whether the delivery of the letter was accomplished by the "agents of the writer, *by agents of the person addressed, or by independent middlemen.*"

In the case at bar, the fraudulent claim was mailed by an agent of the person addressed and having been delivered to that agent for the purpose and with the expectation that it would be so mailed—as it was—Kenofskey's act falls fairly within the terms of section 215.

(3) *On the facts alleged in the present indictment, the defendant would have been guilty of crime, even*

under the provisions of Revised Statutes, section 5480, punishing the mere "placing" in the mails.

Regardless of the language of the statute, however, as to *causing* the letter or package to be mailed, the defendant under the facts charged would have been guilty of an offense under the previous law (sec. 5480, Rev. Stat.), upon which section 215 is based.

In *Hume* v. *United States* (1902—C. C. A., 5th Circ.), 118 Fed. 689—the circuit from which the present case comes—the defendant was indicted for using the mails to defraud under Revised Statutes, section 5480 (wherein the words "cause to be delivered by mail" were not contained), and set up as a defense that it was not proved that he was present when the letters were deposited in the mails. The Circuit Court of Appeals said (p. 698):

> The objection is based solely on the unsound theory that Hume's personal presence at the time the letters were posted was necessary to make him guilty. *If he caused the letters to be deposited, or if they were posted pursuant to a scheme to which he was a party,* he is properly convicted, although he was not present when the letters were posted. [Italics ours.]

In *Allen* v. *United States* (1896), 164 U. S. 492, commenting upon the charge of the court that (p. 496):

> A man who performs an act which it is known will produce a particular result is from our common experience presumed to have anticipated that result and to have intended it—

this court said (p. 496):

> This is nothing more than a statement of the familiar proposition that every man is presumed to intend the natural and probable consequences of his own act. 1 *Greenleaf Ev. Sec.* 18; *Regina* v. *Jones*, 9 C. & P. 258; *Regina* v. *Hill*, 8 C. & P. 274; *Regina* v. *Beard*, 8 C. & P. 143; *People* v. *Herrick*, 13 Wend. 87, 91.

In *Shepard* v. *United States* (1908—C. C. A., 8th Circ.), 160 Fed. 584, where the objection was made that while the defendant mailed the objectionable matter himself, the indictment enlarged the offense by charging the defendant with having mailed it or *caused it to be mailed*, the court said (pp. 595, 596):

> It is true the statute says "who shall deposit or cause to be deposited." The latter alternative was evidently added by the framer of the statute out of abundant caution. But in legal effect it is embraced in the charge that the defendant deposited the letters, etc. If A commits a letter to B to take to the post office and mail it, the latter acts as A's agent. *Facit per alium facit per se. United States* v. *Flemming* (D. C.), 18 Fed. 907–908; *Bates* v. *United States* (C. C.), 10 Fed. 92.

In *Rose et al.* v. *United States* (C. C. A., 8th Circ., 1915), 227 Fed. 357, where the mailing of the matter pursuant to carrying out a scheme to defraud was done by a presumably innocent person, the court held (p. 362):

> Where the act of mailing was done by the procurement of the defendants Rose and

> Warner, it is their act. *Richardson* v. *U. S.*, 181 Fed. 1, 104 C. C. A. 69. It has been held that, where one sets in operation and makes use of an agency which, as he knew at the time, would, *according to its established and regular course*, carry the objectionable matter through the mail to the person to whose attention he designed it to be called, he is responsible for the mailing of the objectionable matter. *Demolli* v. *U. S.*, 144 Fed. 363, 75 C. C. A. 365, 6 L. R. A. (N. S.) 424, 7 Ann. Cas. 121.

The case of *Demolli* v. *United States* (C. C. A., 8th Circ., 1906), 144 Fed. 363, extends the rule here contended for even further than is necessary in the case at bar. In that case the defendant was indicted under Revised Statutes, section 3893, for depositing and causing to be deposited in a United States post office a newspaper containing obscene articles. The Government conceded that the defendant did not personally participate in the mailing of the paper, and the evidence was clear that he had no authority over its publication *or the mode of its distribution*, but was "permitted to write for it as a correspondent." The defendant admitted writing the objectionable articles. He was convicted and the conviction affirmed, the Circuit Court of Appeals through Judge (now Mr. Justice) Van Devanter, saying (p. 365, 366):

> Nor is it essential to the commission of the offense that the objectionable matter be deposited in the mail by the offender himself, *or by another acting under his express direction, because he is equally responsible if it is deposited therein as a natural and probable consequence of*

an act intentionally done by him with knowledge at the time that such will be its natural and probable effect. To illustrate: If one intentionally and secretly inserts a lascivious writing in an unsealed letter written by another, which he knows is intended to be transmitted through the mail, and which is afterwards sealed and put in the mail for transmission, without the presence of the objectionable writing being discovered, he is as guilty under the statute as if the letter were his, and, with the objectionable writing, were deposited in the mail by another acting under his express direction. So also if, with the knowledge and consent of the writer, one intentionally causes a lascivious picture to be inserted in an unsealed letter written by another, which he knows is intended to be transmitted through the mail, and which is afterwards sealed and put in the mail for transmission with the objectionable picture therein, he is guilty under the statute, although he did not say anything about mailing the letter or picture. In either case he is guilty, because he intentionally does an act, the natural and probable consequence of which, as known at the time, is that the objectionable matter will be deposited in the mail along with the other contents of the letter. In the line of causation his act is a proximate cause of the objectionable matter being put in the mail.

If the evidence before recited was true, as was found by the jury, the defendant was responsible for the mailing of the objectionable matter. *He set in operation and made use of an agency which, as he knew at the time, would,*

> *according* to its established and regular course carry the objectionable matter through the mail to the persons to whose attention he designed it should be brought; and it does not lie with him to say that whoever was in charge of the paper might have rejected his articles, that the typesetter might have refused to put them in type, or that whoever in regular course deposited them in the post office might have refused to do so. When the articles were published in the paper by his direction, the mailing of them as part of the paper followed in natural sequence as an incidental or subordinate act produced by their publication, and was in no sense an independent act or self-operating cause which interrupted or changed the natural sequence of events, or produced a result which could not have been reasonably anticipated. [Italics ours.]

The above opinion goes further than is necessary in the case at bar. Had Demolli's express intent been merely to so print the article, that court would have presumed him to have intended the natural consequence of printing, i. e., mailing. Judge Hook, in dissenting, refuses to *imply* the latter intent, but indicates he would have no difficulty with a case like the present where actual intent to cause transmission by mail is present (p. 369).

See also *Burton* v. *United States* (C. C. A. 8th Circ., 1906), 142 Fed. 57, 61.

Multiplication of authorities on this point appears useless. The court below raised no question as to the sufficiency of the indictment, but only whether the

facts stated therein constituted an offense within the statute (sec. 215, C. C.) upon which it was based. As the court said (R. 11):

> It is alleged the defendant knew the documents would be sent by mail and intended that they should be.

That statement of the court brings this case precisely within the terms of section 215, as construed by the authorities cited *supra*.

III.

The decision of the court below as to causation, if sustained, will seriously hamper administration of many other laws making the "causing" of an act a crime.

While it is probably not essential that a statute creating and fixing the punishment for a criminal offense shall explicitly state that a person who caused the offense to be committed shall be deemed guilty, numerous such laws have been enacted; among them, in the Criminal Code, section 28, as to counterfeiting or *causing* or procuring to be made false bonds, bids, or other writing for the purpose of defrauding the United States; section 29, of like effect; section 35, the making or *causing* to be made of false claims against the Government of the United States; section 49, the cutting or *causing* to be cut or *causing* to be wantonly destroyed timber growing on public lands of the United States; section 51, the injuring or *causing* to be injured of any tree for certain purposes growing upon lands of the United States; section 52, the will-

fully setting on fire or *causing* to be set on fire of timber, etc., upon the public domain; section 65, the rescuing or *causing* to be rescued of any property seized by customs or internal-revenue officers; sections 75 and 161, the engraving or printing or *causing* to be engraved or printed of plates designed for the printing of certificates of citizenship, of counterfeit notes, etc.; section 131, the bribing or *causing* to be bribed of officers of the United States; section 176, mutilating or *causing* to be mutilated national-bank notes; section 240, the shipping or *causing* to be shipped from one State into another of unlabeled intoxicating liquors; the white-slave act of June 25, 1910 (36 Stat. 825), the transporting or *causing* women to be transported for immoral purposes in interstate commerce. There are many other laws embodying words of causation of crimes to be found on the statute books of the United States, and if the decision of the lower court in the case at bar is followed the administration of these laws will be seriously hampered.

IV.

The offense charged in the indictment was of a continuing character, and was not ended when Kenofskey handed the false certificates and fraudulent claim to the district superintendent at New Orleans.

The indictment charges (Rec., 7) that the defendant in error having prepared the false documents, knowing that such claims required approval by the home office at Richmond, Va., before payment, and were

transmitted through the United States mails from the New Orleans office by the superintendent (Rec., 8), handed them to the latter for such transmittal. Under these circumstances, Kenofskey might properly have been prosecuted either in the Eastern District of Louisiana or the Eastern District of Virginia. He could not receive the money sought to be obtained by his fraudulent scheme at the time of handing the papers to the local superintendent, and while he became liable to prosecution for the offense charged when the papers were deposited in the mails, the offense continued until its final fruition or failure. It is contrary to reason to say that when he handed the papers to his superior officer his connection with the matter ceased. The most vital element in the transaction both to the insurance company and to Kenofskey remained yet to become an actuality, i. e., the payment and receipt of the money; and while payment and receipt are not necessary to secure the conviction of the offender, they might, and doubtless would, have a most persuasive influence upon the court in determining the sentence to be imposed.

But the offense did not terminate when Kenofskey handed in the false certificates.

Wharton, Criminal Law (11 Ed. 1912), section 334, volume 1, pages 404, 405:

> A party who in one jurisdiction puts in operation a force which does harm in another jurisdiction is *responsible in both jurisdictions for the harm.*

In *Bridgeman* v. *United States* (1905—C. C. A. 9th Cir.), 140 Fed. 577, 591, the defendant was indicted under Revised Statutes, section 5438, for making and *causing* to be made, or presenting and *causing* to be presented, a false claim in connection with Indian affairs against the Government. Under statutory provisions and the rules and regulations of the Indian Department all accounts and vouchers for claims connected with Indian affairs were required to be transmitted to the Commissioner of Indian Affairs for examination, approval, or allowance, etc.

The defendant contended that the offense was not completed in the District of Montana, where the false claim was made and sworn to, but in the District of Columbia, where it was approved and paid by the Treasurer of the United States. The court said (p. 591):

> The answer to this is that the offenses were at least commenced in the State of Montana and therefore come within the provisions of section 731 of the Revised Statutes (U. S. Comp. St. 1901, p. 585), which is as follows:
>
> "When any offense against the United States is begun in one judicial circuit and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district in the same manner as if it had been actually and wholly committed therein."

That case is closely analogous to this and it is quite evident that, following the rule there announced, the defendant in error here might have been prosecuted either in Louisiana or Virginia and his fraudulent scheme did not end when the papers were handed to the local superintendent at New Orleans, as held by the district court.

See also *In re Palliser* (1890), 136 U. S. 257, 267; *Putnam* v. *United States* (1896), 162 U. S. 687; *Stillman* v. *White Rock Mfg. Co.* (1847), 23 Fed. Cas. No. 13446; *Dealy* v. *United States* (1894), 152 U. S. 539, 547; *Benson* v. *Henkel* (1905), 198 U. S. 1, 15; *Hyde* v. *Shine* (1905), 199 U. S. 62, 77; *Burton* v. *United States* (1906), 202 U. S. 344, 387; *United States* v. *Thayer* (1908), 209 U. S. 39, 44; *Haas* v. *Henkel* (1910), 216 U. S. 462, 475, 476; *United States* v. *Murphy* (1898), 91 Fed. 120, 121; *Perara* v. *United States* (1915, C. C. A. 8th Cir.), 221 Fed. 213, 217; *Simpson* v. *State* (Ga. 1893), 44 Am. St. Rep. 75, and note.

CONCLUSION.

It is respectfully submitted that the judgment of the district court should be reversed, and the defendant in error held to plead to the indictment on its merits.

CHARLES WARREN,
Assistant Attorney General.

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